and the service provider transmitting the same, cannot just send whatever message content might be requested or desired by mobile phone users. The wireless carriers have also created and enforce content restrictions on CSC messaging.

First, as noted above, if an entity transmits a CSC text message with content that a wireless carrier perceives was not identified in the general description in the program brief (even if the message is entirely lawful), the wireless carrier can refuse to further recognize the CSC, blocking the ability of messaging services assigned to that particular CSC to reach that wireless carrier's users. Second, the wireless carriers have developed content and interaction standards that a business must follow to continue sending and receiving text messages. Each wireless carrier has its own set of content standards, which are not always published but result in a CSC shut down if allegedly violated.

These content restrictions have caused considerable uncertainty in the industry as a wireless carrier can essentially justify any CSC shut down by pointing to a "content violation" in either their own unpublished standards or other guidelines.[44] While the various guidelines are intended to prevent spam, in practice, they become a tool for the wireless carriers to assert content control over CSC text messages. Nor is it clear why existing laws like the Telephone Consumer Protection Act ("TCPA") or CAN-SPAM are not sufficient to regulate the market and

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[44] *See A Marketers Guide to Messaging Trends and Best Practices*, Mobile Marketing Association (2014) *available at* http://www.mmaglobal.com/bestpractices.pdf. Indeed, imagine the chilling effect on voice communications if carriers could unilaterally and arbitrarily object to the content of the call and shut down service as a result. For example, Verizon presumably would never consider shutting down NARAL if it communicated the same messages in voice rather than in text over its network. There is no logical reason to assume the role of Big Brother for one type of communication but not the other. Consumers of both voice *and* messaging services should be allowed to transmit the lawful content of their own design and choosing without fear of blocking or the need to pre-justify the content of their messages.

prevent spam, along with the inherent power of the Commission and the Federal Trade Commission to investigate and levy fines against bad actors.

To the extent one would argue that the CSC system has limited unsolicited or unwelcomed messages, the facts suggest otherwise. Thousands of TCPA lawsuits are pending in federal court, and many, if not a majority, of these suits involve messages sent over CSCs. The Commission has rightly taken substantial action recently under the TCPA to limit such unwelcomed messages. Indeed, Congress enacted the TCPA to provide ample legal protections to consumers. Congress chose the Commission to implement and enforce the legal restrictions contained in the TCPA through an open process in which all stakeholders could not only be heard, but also understand in advance how to conform their conduct to the law. In short, Congress intended the exact opposite of the CSC system. Twilio submits that grant of this Petition will further the Commission's goals by affirmatively unifying the federal regulatory framework applicable to all communications that utilize the PSTN and PSTN resources.

In sum, wireless carriers can shut down common short code traffic at any time, for any reason, just like they do with messaging services traffic using ten-digit long codes.

IV. MESSAGING SERVICES ARE TELECOMMUNICATIONS SERVICES AND CMRS SUBJECT TO TITLE II

As Twilio noted at the outset, to date the Commission has declined to expressly clarify the status of messaging within its regulatory framework since the widespread adoption of messaging services since 2000. And while the texting acronyms may have changed, the service has remained the same. For messaging services, you put "hello" in, and you get "hello" out.

The issue before the Commission is that simple. Messaging is telecommunications.[45]

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[45] The term "telecommunications" is defined under the Communications Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information **as sent and received**." 47

When carriers offer it to the public for a fee, they are providing a telecommunications service.[46] Indeed, CTIA itself characterizes its members' messaging services offering as a service "that enables wireless subscribers *to send and receive messages using their phone number.*"[47] "If the offering meets the statutory definition of telecommunications service, then the service is also *necessarily* a common carrier service."[48] Title II thus applies to messaging services.

Although the Commission's analysis could and should end here, Twilio establishes below that this outcome can be the only lawful result under both the Communications Act and the Commission's precedent.

A. *Verizon* Compels The Result That Messaging Services Are Title II Services Because The Commission Has Already Classified Messaging Services As Calls Subject To Certain Title II Obligations

In *Verizon*, the D.C. Circuit held that if a communications service is regulated as a telecommunications service subject to common carrier obligations in part, it has to be regulated as a Title II common carrier service as a whole. *Verizon*, 740 F.3d at 650-59. Indeed, as CTIA, AT&T and others recently submitted to the D.C. Circuit in their appeal of the *Open Internet Order*, "[t]he FCC's extension of Title II's common-carriage requirements to that service without classifying it as a telecommunications service is thus an 'obvious' violation of the

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U.S.C. § 153(50) (emphasis added).

46 The term "telecommunications service" "means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, **regardless of the facilities used**." 47 U.S.C. § 153(53) (emphasis added).

47 CTIA SMS Interoperability Guidelines, Version 3.2.2, § 1.1 at 4 (Effective Date: Jan. 1, 2015) (emphasis added), available at http://www.ctia.org/docs/default-source/default-document-library/sms_interoperability_guidelines_v3-2-2_jan_2015-as-posted.pdf?sfvrsn=2; CTIA MMS Interoperability Guidelines, Version 3.0.2, § 1.1 at 7 (Effective Date: Jan. 1, 2015) (emphasis added), available at http://www.ctia.org/docs/default-source/default-document-library/mms-interoperability-guidelines-v3-0-2jan2015-as-posted.pdf?sfvrsn=2.

48 *Open Internet Order*, 30 FCC Rcd. at 5757, ¶ 355.

statute." CTIA Brief[49] at 75; *see also id.* at 28 ("**The *Order's* conclusion that the FCC may subject those arrangements to Title II without classifying this service as a telecommunications service directly contravenes *Verizon*.**") (emphasis added); *id.* at 45 ("*Verizon* held that, because broadband providers 'furnish a service' to edge providers distinct from the retail service they provide to end users, **the FCC could not subject that edge service to Title II without classifying it as a telecommunications service**.") (citing *Verizon*, 740 F.3d at 653) (emphasis added).

Twilio agrees with the wireless carriers and CTIA that the Commission cannot treat messaging services as common carrier services in certain respects without classifying the service as a Title II service as a whole. But that is exactly what the Commission has done. In 2003, the Commission held that a text message is a call under a portion of Title II: Section 227. 47 U.S.C. § 227.[50] The natural presumption in statutory interpretation is to accord a common interpretation across statutory sections.[51] Thus, if a text message is a call for one section of Title II of the Communications Act, it must likewise be regarded as a call for purposes of all of Title II,

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[49] Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink at 75, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. July 30, 2015), ECF No. 1565510 (citing *Verizon*, 740 F.3d at 650) ("CTIA Brief"), *available at* http://www.ustelecom.org/sites/default/files/documents/Joint%20Brief%20of%20Petitioners%20073015.pdf.

[50] Title II of the Communications Act, 47 U.S.C. Chapter 5, Subchapter II – Common Carriers, spans Sections 201 through 276, 47 U.S.C. §§ 201-276, which thus includes the TCPA, 47 U.S.C. § 227. Moreover, Section 227 is in "Part I – Common Carrier Regulation" of Title II. Part I spans Sections 201 to 231, 47 U.S.C. §§ 201-231.

[51] *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("The 1933 [Securities] Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning.") (quoting *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, (1994), and citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

including Sections 201 and 202 of the Act, the cornerstones of the FCC's regulatory authority to prohibit common carriers' unjust, unreasonable, and discriminatory practices. *Verizon* compels this result here.

Indeed, a "telecommunications service" and an "information service" are mutually exclusive.[52] "Under the 1996 Act, any service with a communications component must be either a 'telecommunications service' or an 'information service' (**but not both**)."[53] Accordingly, since the FCC has placed text messages under the rubric of Title II regulation in Section 227, the Commission cannot simultaneously claim that messaging services are "calls" for purposes of Section 227, but refuse to classify messaging services as a Title II telecommunications service. In short, once in Title II, text messages are required be treated as subject to all of Title II, including Sections 201 and 202.[54]

More recently, the Commission's Enforcement Bureau and AT&T Mobility LLC agreed to a Consent Decree in which AT&T agreed to pay $105 million to resolve allegations regarding AT&T's billing practices associated with its premium SMS service.[55] The Enforcement Bureau identified Section 201(b) as its only source of authority in the Communications Act to regulate

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52 *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* 19 FCC Rcd. 7457, 7460, ¶ 4 (2004) ("[T]he Commission declined to treat providers of enhanced services as common carriers subject to regulation under Title II of the Communications Act of 1934").

53 *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, et al., Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, 24029 ¶ 34 n.50 (1998).

54 Because the same communication cannot be both a telecommunications service and an information service, the Commission would be required to reverse its decision that a text message is a call under the TCPA if it denies this Petition.

55 *See AT&T Mobility LLC Unauthorized Third-Party Billing Charges*, DA-14-1457, Order, ¶ 1, File No.: EB-TCD-14-00016480 (rel. Oct. 8, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1008/DA-14-1457A1.pdf.

AT&T's charges for this messaging service.[56] Section 201 is applicable to all "communication by wire or radio" provided by *common carriers*, 47 U.S.C. § 201(a), and Section 201(b) requires that all "charges ... for and in connection with *such communication service*," that is, Title II telecommunications service, "be just and reasonable." 47 U.S.C. § 201(b). Accordingly, the Commission, through the Enforcement Bureau, has already regulated a common carrier's messaging services as a Title II service, as again, Section 201 was the only source of statutory authority identified by the Enforcement Bureau. And AT&T agreed that the Commission has the authority to regulate messaging services under Title II – it would not have been a *consent* decree otherwise – and further agreed to pay $105 *million* in fines and restitution based solely on this Title II source of statutory authority.

In sum, CTIA put it best when it stated that the Commission "could not subject that [] service to Title II without classifying it as a telecommunications service." CTIA Brief at 45. For messaging services, the Commission has been subjecting such services to selective treatment under Title II for over a decade. It is well past time for the Commission to confirm that messaging services are telecommunications services, and thus subject to Title II in its entirety. The D.C. Circuit's decision in *Verizon* mandates that the Commission do so.

B. Refusing To Classify Messaging Services As Title II Services After The *Open Internet Order* Creates An Untenable Contradiction In The Statutory Framework

Twilio supported the Commission's efforts in the *Open Internet* proceeding.[57] As Twilio submitted, "but for the emergence of the Internet and its emergence as an open platform, literally many thousands of companies, Twilio included, would not exist. The Internet has evolved in a

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56 *Id.* ¶ 4.

57 *See* Comments of Twilio, Inc. at 9-10, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (filed July 18, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521749752.

manner that has placed consumer demands first, enabling consumers – and their application, network and content providers of choice – to have ubiquitous and seamless access to the lawful communications means and content of their choosing."[58] Ironically, however, the Commission refused to address in its *Open Internet Order* the very real threats "of blocking and discrimination that consumers, Twilio, and others experience on a day-to-day basis."[59]

As Twilio established in Section III above, the only thing that is ubiquitous and seamless across the wireless carriers' networks is their business model of blocking lawful messaging services traffic on a daily basis. Indeed, blocking entire (artificial) categories of messaging services traffic from using ten-digit numbers and forcing such traffic to use CTIA's shadow numbering system substantially finances CTIA.[60] But as CTIA itself has agreed, messaging services are a *converged* service, meaning they are (or should be, if the wireless carriers were prohibited from engaging in unlawful blocking, throttling and discrimination under Title II) interoperable between wireless, wireline and Internet telecommunications services.[61] Stated differently, allowing wireless carriers with monopoly power over their end users to treat messaging services as if they exist in a regulatory no man's land creates an inherent, and untenable, contradiction in the regulatory framework.

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58 *Id.* at 2.

59 *Id.* at 10.

60 In 2013, for example, CTIA – a 501(c)(6) non-profit – made 45% of its revenues, or $27.4 million, effectively selling shortened telephone numbers. *See* CTIA Return of Organization Exempt From Income Tax, Form 990, at 9, *available at* http://www.guidestar.org/FinDocuments/2013/521/347/2013-521347628-0af1effd-9O.pdf. Royalties from the CSC system are CTIA's single largest source of revenue by far.

61 *CTIA – The Wireless Association Announces Updates to SMS/MMS Interoperability Guidelines*, Reuters, Mar. 31, 2009 *available at* http://www.reuters.com/article/2009/03/31/idUS140902+31-Mar-2009+BW20090331.

1. Messaging Services Are Undeniably Telecommunications Services

In determining that broadband Internet access service is a telecommunications service subject to Title II, the Commission held that

> Three definitional terms are critical to a determination of the appropriate classification of broadband Internet access service. First, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information **as sent and received**." Second, the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Finally, "information service" is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." **We observe that the critical distinction between a telecommunications and an information service turns on *what the provider is "offering."* If the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.**[62]

As established above, CTIA itself characterizes both SMS and MMS service as a service **"that enables wireless subscribers *to send and receive messages using their phone number*."**[63] CTIA thus describes messaging services as pure telecommunications, and one that is functionally equivalent to voice telephone service as well.

The wireless carriers' promotional material similarly must lead to the conclusion that what they are offering is a telecommunications service:

- Verizon Wireless – "What is a text message (SMS)? A text message is a short, typed **message you send or receive** on a mobile device.... **You can send and receive text messages** to other mobile devices and email addresses directly from

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62 *Open Internet Order*, 30 FCC Rcd. at 5757, ¶ 355 (citing 47 U.S.C. § 153(50); *Id.* § 153(53); and *Id.* § 153(24)) (emphasis added).

63 CTIA SMS Interoperability Guidelines at 4; CTIA MMS Interoperability Guidelines at 7.

your mobile device, while keeping your communication short and private. It's a quick and easy way to stay in touch with your friends and family **when you aren't able to step away for a phone call.**"[64] Thus, according to Verizon, text messaging is not only a telecommunications service, it is also the functional equivalent of voice service. And for MMS messages, Verizon similarly states that a "multimedia message is a message **sent or received on your mobile device** that contains a picture, video or other multimedia file attached."[65]

- AT&T – "With AT&T Messaging, **you can exchange text, picture and video messages** with wireless devices in the U.S. or international locations" or "[u]se your device's messaging capability to email a text, picture, or video message to or from an AT&T wireless device."[66]
- Sprint – "**Send texts** from your phone or from My Sprint online. Text mobile phones, **email addresses and even landline phones**."[67] And in contrast to information services that allow users to store information, Sprint informs its customers that "we don't store any text message content, which is the actual text of the **message sent between you and someone else**."[68]

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64 *See Text Messaging FAQs*, Verizon Wireless (last visited Aug. 5, 2015), *available at* http://www.verizonwireless.com/support/text-messaging-faqs/. As further detailed by Verizon, messages are also billed based on how many are sent and received, except for the unlimited plan, where Verizon Wireless subscribers can "[s]end and receive as many texts as you want without paying additional fees." *Id.*

65 *See Multimedia Messaging FAQs*, Verizon Wireless (last visited Aug. 5, 2015), *available at* http://www.verizonwireless.com/support/multimedia-messaging-faqs/ (emphasis added).

66 *See Messaging Overview*, AT&T Inc. (last visited Aug. 5, 2015), *available at*http://www.att.com/esupport/article.jsp?sid=52379&cv=820 (emphasis added).

67 *See Services*, Sprint.com (last visited Aug. 5, 2015), *available at* http://support.sprint.com/support/servicepage?INTNAV=LeftNav:Support:Services#!/.

68 *See Get Text Message Details*, Sprint.com (last visited Aug. 5, 2015), *available at*

- T-Mobile – "You can use your phone to **send and receive** short text and email messages. Text messaging allows you to send messages to T-Mobile and non-T-Mobile customers who have text-capable devices. **You can send messages to any email address**. You can also have email sent to your device via text message."[69] And "[p]icture messaging (MMS) is a service that allows you **to send and receive messages with multimedia content**, not necessarily just text. Picture messaging **lets you send or receive messages** containing pictures, video, text, audio, or a combination."[70]

The wireless carriers are expressly offering the public pure telecommunications; that is, the ability to transmit messages of "the user's design and choosing, without change in the form or content of the information **as sent and received**."[71] Because they are offering this service to the public for a fee, they are providing a telecommunications service.[72] And because "the offering meets the statutory definition of telecommunications service, **then the service is also *necessarily* a common carrier service**."[73] Again, the Commission's analysis here should be that simple.

Indeed, the Commission rejected numerous arguments advanced by broadband Internet access service providers that are even less compelling in the context of messaging services. It

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http://support.sprint.com/support/article/Get-text-message-details/case-wh164052-20100429-155822#!/.

69 *See Text Messaging (SMS)*, T-Mobile USA, Inc. (last visited Aug. 5, 2015), *available at* https://support.t-mobile.com/docs/DOC-3309 (emphasis added).

70 *See Picture Messaging (MMS)*, T-Mobile USA, Inc. (last visited Aug. 5, 2015), *available at* https://support.t-mobile.com/docs/DOC-3310 (emphasis added).

71 47 U.S.C. § 153(50) (emphasis added).

72 47 U.S.C. § 153(53).

73 *Open Internet Order*, 30 FCC Rcd. at 5757, ¶ 355 (emphasis added).

bears repeating, messaging services use the NANP, i.e., messaging services are interconnected with the PSTN. It would be an entirely incongruous result if telecommunications sent by or received on telephones and addressed to telephone numbers would fall outside of Title II, but data transmitted solely between IP addresses is protected by Title II. But as the Commission stated in the context of broadband Internet service traffic, "we have never understood the definition of 'telecommunications' to require that users specify – or even know – information about the routing or handling of their transmission along the path to the end point, nor do we do so now."[74]

Similarly, the Commission rejected broadband Internet access providers' arguments that they provide an information service, instead of a telecommunications service, because they convert the protocol of the transmissions their subscribers send. The Commission reasoned that "the IP conversion functionality is akin to traditional adjunct-to-basic services, which fall under the telecommunications system management exception."[75] As the Commission noted:

> [t]hroughout the history of computer-based communication, Title II covered more than just the simple transmission of data. Some features and services that met the literal definition of "enhanced service," but did not alter the fundamental character of the associated basic transmission service, were considered "adjunct-to-basic" and treated as basic (*i.e.*, telecommunications) services even though they went beyond mere transmission.[76]

Here, by contrast, the wireless carriers are *only* advertising a basic transmission service, that is, the ability to send and receive messages, as detailed above. Again, that should end the analysis under the Commission's holding in the *Open Internet Order*.[77]

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74 *Id.* at 5761-62, ¶ 361.

75 *Id.* at 5772, ¶ 375.

76 *Id.* at 5766, ¶ 367 n.1029.

77 Thus, any attempts by the wireless carriers to argue that they provide additional add-on services, such as message storage, should not change the conclusion that the wireless carriers are

2. Messaging Services Are CMRS

Congress provided that "commercial mobile services" – that is, mobile services "interconnected" with "the public switched network" – must be regulated as common carriage under Title II. 47 U.S.C. §§ 332(c)(1)(A), (d)(1)-(2); *see also* 47 C.F.R. § 20.3 (defining "public switched network" as a "common carrier switched network ... that use[s] the North American Numbering Plan" (that is, ten-digit) telephone numbers).

As an initial matter, the Commission has already ruled that messaging services *are* interconnected with the public switched network:

> With respect to push-to-talk **and SMS**, we note that such offerings are typically bundled as a feature on the handset with **other CMRS services**, such as real-time, two-way switched mobile voice or data, that **are interconnected with the public switched network**.... We are also aware that consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services, and expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas.[78]

Further, the Commission held in the *Open Internet Order* "that mobile broadband Internet access service meets the definition of interconnected service for a wholly independent reason: because – even under our existing definition of 'public switched network' adopted in

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providing a telecommunications service. As the Supreme Court found in *Brand X*, "a telephone company that packages voice mail with telephone services offers a **transparent transmission path** – telephone service – that transmit information independent of the information-storage capabilities provided by voicemail.... [W]hen a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 998 (2005).

[78] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15837, ¶ 55 (2007). To be sure, the Commission also stated that some unspecified SMS services were not interconnected to the public switched network. The messaging services relevant to the Petition, however, are necessarily interconnected to the PSTN because they are sent or received using NANP ten-digit numbers. This also includes messaging services that the carriers force into the CSC system, as these messages are still sent to or received by one device assigned a ten-digit number.

1994 – users have the 'capability,' as provided in section 20.3 of our rules, to communicate with NANP numbers using their broadband connection through the use of VoIP applications."[79] This same holding applies with more force here. Messaging services are designed to communicate with NANP numbers. Undeniably, communicating with NANP numbers is the essence of messaging services, not merely a capability.

Indeed, CTIA's and its members' objections to the Commission reclassifying mobile broadband as a telecommunications service subject to Title II are predicated on their argument that "mobile broadband… does not use the North American Numbering Plan" and "does not provide the capability for users to communicate with the telephone network." CTIA Brief at 59; *see also id.* at 60 ("**Congress gave the FCC authority to define 'the public switch network' to reach, for example, a paging system that connects to the telephone and uses the North American Number Plan but is not itself a telephone service.**") (emphasis added). Thus, CTIA has already conceded that messaging services are interconnected to the telephone network because such services rely on NANP numbers.

It therefore *must* follow – Section 332(c)(1)(A) mandates that a person engaged in providing CMRS be treated as a common carrier, 47 U.S.C. § 332(c)(1)(A) – that messaging services are a common carrier service subject to Title II on this independent basis.[80]

C. Affirmative Title II Classification Will Prevent The Market Failures Detailed Above

The market for messaging services is not really a market at all. It is more of a shadow

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79 *Open Internet Order*, 30 FCC Rcd. at 5786, ¶ 400.

80 Thus, this conclusion is independent of whether the *Open Internet Order* is successfully appealed. The wireless carriers, through CTIA, have conceded in their Brief that messaging services are interconnected services because they rely on NANP numbers *and* they concede that the Commission has the authority to regulate such services as common carrier services under Title II, as they must.

system overseen by the wireless carriers' trade group and enforced through these carriers' monopoly power over their end-user subscribers. Just as the Commission recognized in the *Seventh Report and Order* that competitive local exchange carriers can abuse their monopoly power over the connections to their end users,[81] the monopoly power that wireless carriers have over their subscribers has created market-distorting effects. Indeed, it has created an entirely artificial market: the common short code system run by CTIA that has not changed its prices since it was established in 2003.[82] What competitive market can boast that its prices have been in the same equilibrium state for 12 straight years?

The main cause of this market failure is the wireless carriers' message-blocking practices and refusal to interconnect with other providers. These practices provide the wireless carriers and their business partners the ability to demand supracompetitive prices[83] on the messaging services traffic that they do not force into the common short code system. If messaging services were classified as a Title II service, the wireless carriers would necessarily be prohibited from engaging in these unjust and unreasonable practices.

Indeed, the Commission has repeatedly prohibited call blocking for any reason. *See, e.g.*, *Connect Am. Fund et al.*, 26 FCC Rcd. 17663, 17903, ¶ 734 (2011) ("We decline to adopt any

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81 *See Access Charge* Reform, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking16 FCC Rcd. 9923, 9938, ¶ 39 (2001) ("it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers.") ("*Seventh Report and Order*").

82 To be clear, Twilio is not advocating that the Commission prohibit the common short code system. If certain messaging services subscribers find value in the common short code system, that is their decision. What Twilio objects to is *forcing* messaging services subscribers to buy into the common short code market by blocking their traffic that originates from ten-digit long codes.

83 As noted above, the rates for SMS termination per individual message are 2 to 6 times higher than $0.0007 for one minute of voice traffic, despite one minute of voice traffic equaling approximately 3,000 SMS messages in terms of bandwidth used.

remedy that would condone, let alone expressly permit, call blocking. The Commission has a longstanding prohibition on call blocking. . . . We find no reason to depart from this conclusion. We continue to believe that call blocking has the potential to degrade the reliability of the nation's telecommunications network. Further . . . call blocking ultimately harms the consumer[.]"); *Rural Call Completion*, WC Docket No. 13-39, Notice of Proposed Rulemaking, 28 FCC Rcd. 1569, 1572, ¶ 7 (2013) (reaffirming the prohibition against call blocking by any carrier: "The Commission has stated that carriers are prohibited from blocking, choking, reducing, or restricting traffic in any way[.]"). Indeed, the Commission even prohibits providers of inmate telephone service from blocking inmates engaging in "call diversion schemes," ruling that "call blocking is largely antithetical to the fundamental goal of ubiquity and reliability of the telecommunications network."[84]

Indeed, just recently the Commission confirmed that "nothing in the Communications Act or our rules or orders prohibits carriers or VoIP providers from implementing call-blocking that can help consumers ***who choose*** to use such technology" to stop unwanted calls.[85] That is, the decision has to be the consumer's choice, not the carriers': "there appears to be no legal dispute in the record that the Communications Act or Commission rules do not limit consumers' right to block calls, **as long as the consumer makes the choice to do so**."[86] As detailed above, the status quo for messaging services is the inverse of the Commission's mandate to let consumers decide which messages they choose to receive. Indeed, the wireless carriers' standard operating procedure is to block lawful messaging services traffic as a matter of course in spite of

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84 *Policies and Rules Concerning Operator Service Providers*, CC Docket No. 90-313, Declaratory Ruling and Order, 28 FCC Rcd. 13913, 13913, ¶ 1 (2013).

85 *2015 TCPA Declaratory Ruling*, ¶ 152.

86 *Id.* ¶ 156 (emphasis added).

consumers expressly requesting such messages from the sender. Through this Petition, Twilio is simply asking the Commission to confirm that consumers have this choice for messaging services as well.

In short, Title II would prohibit unfettered carrier message blocking (or preapproval of use cases), and permit fair interconnection, fair routing, and the fair use and allocation of telephone numbers. This will ultimately lead to fair, market-based prices once the wireless carriers' monopoly power is constrained.[87]

V. CONCLUSION

In sum, Twilio urges the Commission to resolve any remaining uncertainty surrounding the regulatory status of messaging services. The Commission should declare that these messaging services are governed by Title II, which is the only result that can be consistent with the D.C. Circuit's *Verizon* decision and the Commission's *Open Internet Order*.

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[87] To be sure, to the extent that the Commission determines that not every provision of Title II is appropriate for messaging services, the Commission can forbear from such provisions as it did in the *Open Internet Order*. There, the Commission demonstrated that it can forbear from those Title II statutes and regulations that are "not necessary to ensure that the charges, practices, classifications, or regulations" associated with a telecommunications service are just and reasonable. 47 U.S.C. § 160(a).

Dated: August 28, 2015

Respectfully submitted,

By: _____

Michael B. Hazzard
Adam D. Bowser
Arent Fox LLP
1717 K Street, N.W.
Washington, DC 20006
Tel: (202) 857-6029
Fax: (202) 857-6395
michael.hazzard@arentfox.com
adam.bowser@arentfox.com

Counsel to Twilio Inc.

ANNEX A

The History And Economics Behind The Common Short Code System

Twilio provides below a more detailed history of CTIA's Common Short Code system and the economics underpinning this system to further demonstrate both CTIA and its wireless carrier members "have the economic incentives and technical ability to engage in practices that pose a threat to [messaging services] openness by harming other [messaging services] providers, edge provider, and end users."[88]

1. CTIA's Creation Of A Shadow Numbering System

If a business wanted to send a text message to its customers, such as using its telephone number 1-800-FLOWERS associated with its wireline service, there was no way to do so because the wireless carriers would not allow it. There was a conscious decision on the part of the wireless carriers to not interconnect with the landline network based on the content of the call, in other words. Although as noted above, technology has advanced to where text messages can be sent to mobile phones from any number of sources, such as a website, texting application or wireline telephone, the wireless carriers do not allow commercial messages through messaging services using ten-digit telephone numbers. Stated differently, the wireless carriers block messages based on content.

By 2003, the wireless carriers recognized that businesses wanted to use text messages for commercial purposes. Text messages were simply another medium to communicate with customers or potential customers, no different than radio, television, the Internet, email, or print. Businesses saw the value in reaching mobile phone users with text messages about their products and services, but businesses could not obtain a ten-digit telephone number and send text

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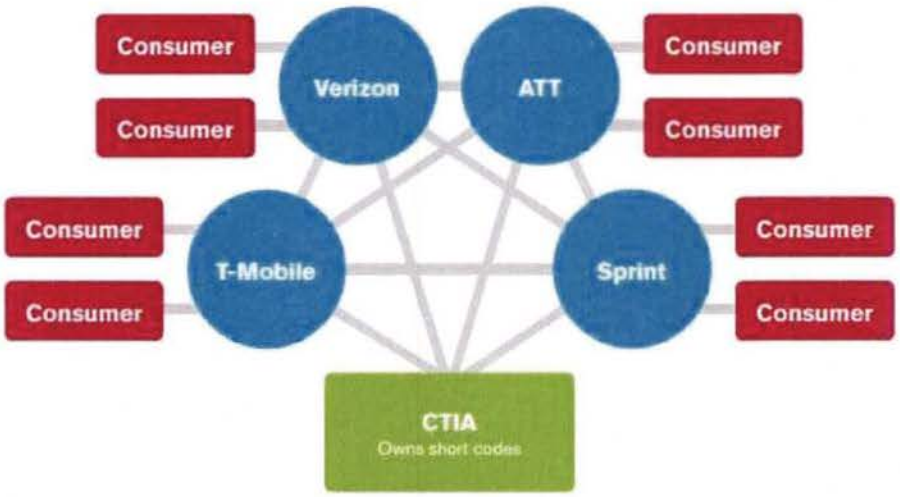
88 *Open Internet Order*, 30 FCC Rcd. at 5628, ¶ 78.

messages to consumers requesting information.

Instead, announced in early 2003 and implemented by the end of 2003, the wireless carriers agreed to create a new numbering system outside of the strictures of the North American Numbering Plain ("NANP") for businesses wanting to use text messages for commercial purposes. The wireless carriers met through their trade organization, CTIA, and through CTIA, agreed to create 5 digit numbers that businesses could use for called common short codes ("CSCs") or short codes.[89] They collectively agreed (without government involvement or approval) to adopt the 5 digit numbers and that CTIA would administer the CSC database:



In 2006, CTIA announced that it would recognize 6 digit CSCs.[90] Short code text

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89 *See* Zachary Rodgers, *CTIA Debuts Universal SMS Short Codes,* ClickZ (Oct. 22, 2003), *available at* http://www.clickz.com/clickz/news/1702180/ctia-debuts-universal-sms-short-codes.

90 *See Common Short Code Administration Announces Open Registration of 6-Digit Codes,* Business Wire (May 31, 2006), *available at* http://www.businesswire.com/news/home/20060531005357/en/Common-Short-Code-Administration-Announces-Open-Registration#.VcJmK2DbLcs.

messages are technically no different from a text message using a ten-digit telephone number. A short code text message uses the control channel just like a regular text message (and is limited to 160 characters and 140 bytes), the short code is simply a shorter address.[91] Other than the shorter number, there is no difference between a short code text message and a 10 digit telephone number text message, and the user assigned a particular short code can send and receive messages to ten-digit telephone numbers.

In creating the CSC system, the wireless carriers, through CTIA, effectively agreed to remove commercial text messages from the existing government-controlled NANP system of obtaining a ten-digit telephone number. The NANP was established by Congress, is regulated by the Commission, and is administered by the North American Numbering Plan Administrator ("NANPA"), which neutrally administers numbering resources. Obtaining ten-digit telephone numbers through NANPA is not costly, takes moments, and there is no need for the company to obtain a review by NANPA for what use it will put the telephone number. An individual or business can simply obtain the number from one carrier (and negotiate among different carriers on price) and it is recognized by all carriers. There was no technical or regulatory reason that businesses wishing to utilize messaging services for commercial purposes could not have used ten-digit numbers obtained through NANPA.[92] Every other innovation in telephone number dialing patterns was folded into the existing NANP system, such as 800 and 900 numbers. The carriers did not get together and create a new numbering system for toll-free calls outside of

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91 CTIA has stated that a short code is simply a shorter address for a standard text message. The fundamental nature of the text message and message transmission are the same, and CTIA conceded that "their service classification should be the same as SMS." Comments of CTIA, WT Docket No. 08-7 (filed Mar. 14, 2008) at 45 ("CTIA Comments"), *available at* http://files.ctia.org/pdf/filings/080314_SMS-CSC_Comments_Final.pdf.

92 Any technological limitations on using a ten-digit telephone number for commercial messaging services are solely the result of limitations created or implemented by the wireless carriers and those working with the wireless carriers.

NANP – the existing 800 area code was simply repurposed for that use.

2. The Operation Of The Common Short Code System

Implementation of the CSC numbering system has been relatively uniform since the wireless carriers agreed to its creation. As noted above, when the wireless carriers agreed to create the CSC system, they put the administration of the system in the hands of their trade organization, CTIA, which was tasked with maintaining the database of codes. CTIA has contracted with Neustar to run the CSC database, and serve as the Common Short Code Administrator ("CSCA"):[93]

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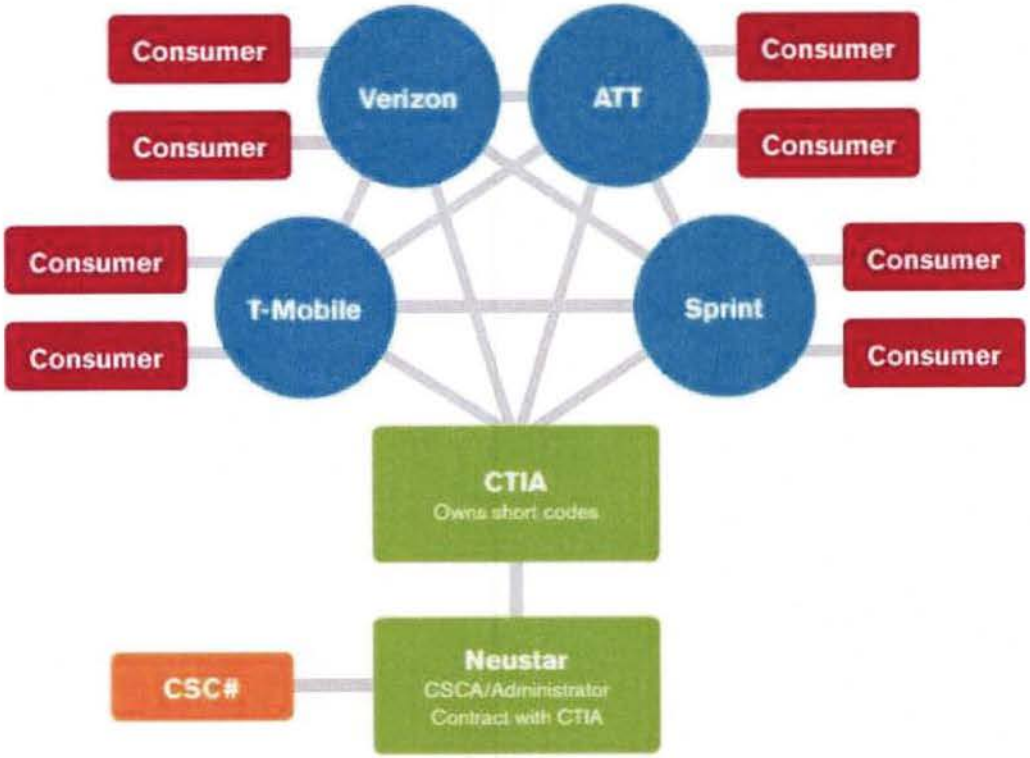
93 *See About Us*, Neustar, Inc. (last visited Aug. 5, 2015), *available at* http://www.neustar.biz/about-neustar/about-tabs/history; Common Short Code Administration (last visited Aug. 5, 2015) http://www.usshortcodes.com/.



CTIA estimated in early 2013 (the last year for which data is readily available) that there were approximately 5,000 active short codes at that time in the U.S. market.[94] The current charges for CSCs are $500/month for a random short code and $1,000/month for a specific CSC,[95] and previous industry analysis indicates that CSC are about 60% random and 40%

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94 *See CTIA Selects WMC Global to Provide Short Code Management in Latin America*, CTIA (Jan. 3, 2013) *available at* http://www.ctia.org/resource-library/press-releases/archive/ctia-selects-wmc-global-to-provide-short-code-management-in-latin-america.

95 *See Order Your Common Short Code*, CSCA (last visited Aug. 5, 2015), *available at* https://www.usshortcodes.com/get-a-sms-short-code/basic-search-for-short-code.php#.Vb5uk2DbKM-. These rates have not changed since inception of the common short code system.

specific.[96] That means Neustar collects approximately $18 million a year on random CSCs (3,000 codes * $6000/year) and $24 million a year on specific CSCs (2000 codes * $12000/year). Neustar's public SEC filings indicate that the number of short codes in use have increased year-to-year. In Neustar's 2013 10K on page 44, for example, Neustar reported "[r]evenue from our Enterprise Services operating segment increased $19.0 million due to an increase of $11.3 million in revenue from Registry Services. This increase was due to continued growth in the number of common short codes and domain names under management and revenue from system enhancements.," and on page 52 that "Registry Services revenue increased $8.4 million due to an increase in the number of common short codes and domain names under management."[97] That is, it appears[98] CTIA gets around 75% of the revenue, or $31.5 million a year, effectively selling telephone numbers. This would be unthinkable, as well as unlawful, for ten-digit telephone numbers.

Accordingly, the wireless carriers and CTIA have an economic incentive to block messaging services traffic from using ten-digit NANP telephone resources and force such traffic into the premium CSC system.

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96 *See* Bill Siwicki, *How to Secure a Short Code for Text Message Marketing*, Internet Retailer (May 12, 2011), *available at* http://www.internetretailer.com/2011/05/12/how-secure-short-code-text-message-marketing.

97 *See* NeuStar, Inc., 2013 Form 10-K, *available at* http://www.sec.gov/Archives/edgar/data/1265888/000119312513083439/d446532d10k.htm.

98 *Amended and Restated Common Short Code License Agreement Between CTIA — The Wireless Association ® and Neustar, Inc.*(Effective June 2, 2008), *available at* http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6093247-317731-749867&SessionID=uAZFHqfYVohHtP7 (royalty information in Exhibit C-2 is confidential and redacted).